PEOPLE'S PARKWAY DVPT. PTE. LTD., RE

HIGH COURT, SINGAPORE
LP THEAN J
[COMPANIES WINDING-UP NO. 437 OF 1986]
30 SEPTEMBER 1991

COMPANY LAW: *Winding-up - Application by Government to be substituted as petitioning creditor - Power of Court - Failure by originating petitioner to proceed with winding-up - Right to present petition - Meaning of - Contingent creditor - Discretion of Court - Delay - Insolvency - Companies (Winding-up) Rules 1969, Cap. 50, 1990 Edn., r. 33(1) - Companies Act s. 253(1)(b).*

A petition to wind up a company was presented by People's Park Katong Dvpt. Pte. Ltd. (Katong), against People's Park Development Pte. Ltd. (the company).

The hearing of the petition however was adjourned *sine die* with the consent of Katong.

This was the application by the Attorney-General (applicant) to be substituted as the petitioning creditor in place of Katong.

The issues were:

(1) whether the application fell within r. 33(1) of the Companies (Winding-up) Rules 1969;

(2) whether the applicant was a person who would have a right to present the petition within the meaning of r. 33(1);

(3) whether the Court should exercise its discretion in granting or refusing an order for substitution.

Held:

[1] The commencement part of r. 33(1) provides that where a petitioner is not entitled to present a petition, a substitution order may be made; a *fortiori*, if the petitioner cannot proceed with the petition by reason of any impediment, as in the instant case, a substitution order may also be made. Therefore, the application falls within r. 33(1)(b).

[2] It is clear that the words "would have a right to present the petition" refer to a right to present that particular petition at the time it was presented and in the instant case, on 27 June 1986. The applicant is a person who has a right to present the petition as there was no dispute that the Government of Singapore was a creditor of the company at the material time.

[3] In the alternative, as there still remains an obligation on the part of the company to pay the Government the instalments for the purchase of a piece of land, the Government was a contingent or prospective creditor under s. 253(1)(b) of the Companies Act and was entitled to present the petition.

[4] In this case as the hearing of the petition has been delayed for a considerable length of time and as the company is hopelessly insolvent, the Court exercised its discretion under r. 33(1) and ordered a substitution.

[Order accordingly.]

Cases referred to:

Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn. Bhd. [1989] 3 MLJ 172 ***(dist)***

In re William Hockley Ltd. [1962] 1 WLR 555 ***(foll)***

Community Dvpt. Pty. Ltd. v. Engwirda Construction Co. [1969] 120 CLR 455 ***(foll)***

Legislation referred to:
Companies Act [Sing], s. 253(1)(b)
Companies Winding-Up Rules 1969 [Sing], r. 33(1)(b)

For the attorney-general - Pertus Huang
For the company - Wee Harry Lee (Sum Chong Mun with him)

JUDGMENT

LP Thean J:

This was an application by the Attorney-General (the applicant) to be substituted as the petitioning creditor in place of the People's Park Katong Development Pte. Ltd., in liquidation (Katong) in the petition for the winding-up of People's Parkway Development Pte. Ltd. (the company). The applicant initiated this application on behalf of the Government of Singapore as a creditor of the company. When the application first came before me, after hearing arguments of the respective Counsel, I dismissed it with costs. The applicant, however, then requested for a hearing of further arguments, and I acceded to the request. On further hearing, I was persuaded that the order previously made by me was wrong. I therefore recalled the order (which had not been extracted), allowed the application and made an order in terms thereof. I now give my reasons.

This companies winding-up petition No. 437 of 1986 was presented by Katong against the company of 27 June 1986, and since then has not progressed very far. On 30 November 1987, the hearing of the petition, with the consent of Katong, was adjourned *sine die* pending the outcome of two related matters:

(a) the application by way of summons-in-chambers No. 6412 of 1987 for the removal of the liquidators of Katong, and

(b) the application by way of summons-in-chambers No. 8765 of 1986 for the reversal of the decision of the liquidators of Katong in rejecting the proof of debt filed by the company.

Since then both the summonses had been heard and disposed of by me some time ago. With respect of Summons-in-Chambers No. 6412 of 1987 I gave my decision on 10 July 1990 in which I refused to remove the liquidators, and as regards summons-in-chambers No. 8765 of 1986 I gave my decision on 22 January 1991 in which I refused to reverse the decision of the liquidators of Katong in rejecting the proof of debt filed by the company. Against my decisions on the two applications, appeals have been filed and are presently pending before the Court of appeal.

The applicant on 4 March 1991 took out this application, summons-in-chambers No. 1327 of 1991, for an order that the applicant be substituted as the petitioner in place of Katong in the winding-up petition. The application was made under r. 33(1) of the Companies (Winding-Up) Rules 1969, which provides as follows:

> 33(1) When a petitioner is not entitled to present a petition or, whether so entitled or not, where he:
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> (a) fails to take all the steps prescribed by these rules preliminary to the hearing of the petition;
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> (b) consents to withdraw his petition or to allow it to be dismissed or the hearing to be adjourned; or

(c) fails to appear in support of his petition when it is called on in Court on the day originally fixed for the hearing thereof or on any day to which the hearing has been adjourned or if appearing does not apply for an order in terms of the prayer of his petition,

the Court may, upon such terms as it thinks just, substitute as petitioner any person who, in the opinion of the Court, would have a right to present the petition and who is desirous of proceeding with the petition.

It was submitted by Counsel for the applicant that as the hearing of the petition was, with the consent of Katong, adjourned *sine die*, Katong, in effect, had consented to allow the hearing to be adjourned *sine die* and therefore, the Court has the power under r. 33(1)(b) to make the order for substitution. Counsel for the company, on the other hand, submitted that though Katong had consented to the adjournment it could not proceed with the petition, even if it had intended to do so, because of the two matters raised at the time. Even as of now, it could not proceed further because of the appeals pending before the Court of Appeal. Accordingly, an order for substitution ought not to be made under that rule. I was unable to agree with this contention. As Counsel for the applicant submitted, the commencement part of r. 33(1) provides that where a petitioner is not entitled to present a petition, a substitution order may be made; a *fortiori*, if the petitioner cannot proceed with the petition by reason of any impediment, as in the instant case, a substitution order may also be made. In my judgment, the application falls within r. 33(1)(b).

I now turn to the next question, which is whether the applicant is a person who would have a right to present the petition within the meaning of r. 33(1). Mr. Ter Kim Cheu, the Deputy Senior State Counsel, in his affidavit affirmed on 4 March 1991, stated that the company was indebted to the Government of Singapore in the sum of $40,939,984 arising from the failure of the company to make full payment for the purchase of land at Marine Parade/East Coast Parkway from the government in 1981 and that a statutory demand was served on the company on 2 January 1991 for payment of this amount. It was submitted by Counsel for the company that the Government was not the person "who would have the right to present the petition", as at the time when the winding up petition was presented, that is, 27 June 1986, the government had no claim against the company. He relied on the decision of George J in *Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn. Bhd.* [1989] 3 MLJ 172. In that case, at the hearing of the companies winding-up petition, the petitioner informed the Court that it had no further interest in the petition. Two supporting creditors then applied for substitution, but before the applications were heard the debtor company applied to strike out one of the supporting creditors on the ground that creditor had no *locus standi* to support the petition. The learned Judge examined in great detail the two judgment debts on which the supporting creditor founded its right. He found that the first judgment, which was default judgment, was entered irregularly and ought to be set aside *ex debito justitiae*. As for the second judgment it was entered after the petition was filed and the judgment debt was "not a provable debt in the winding up *per se* the judgment" and that accordingly the basis on which the supporting creditor founded its right was "not a sound basis". The learned Judge came to the following conclusion at p. 177:

> Accordingly as the two judgments on which KSY initially founded its right to be a supporting creditor have turned out to be not a sound basis and as the right to the agreed lump sum had not crystallised prior to the date of presentation of the petition herein and in any event as the debtor has a substantial cross-claim against KSY in my judgment KSY cannot be recognised in this petition as a supporting creditor.

As can be seen, the decision there turned on the facts before the Court which were quite different from those in the instant case.

I think it is clear that the words "would have a right to present **the** petition" refer to a right to present that particular petition at the time it was presented and in the instant case on 27 June 1986. I decided this point some three years ago in my judgment (unreported) in *In re Marinaview Pte. Ltd.* in companies winding up No. 536 of 1987.

In that case, the petitioner, which was a Delaware corporation, presented a winding-up petition against the debtor company but later found that the alleged debt was owed by the company to the petitioner's affiliate corporation. The petitioner thereupon applied, *inter alia*, for an order under r. 33(1) that its affiliate corporation be substituted as a petitioner in its place. I refused the application both on a procedural ground and on the merits. The facts there were of course entirely different from those in the instant case. In particular, there were ample materials before me showing plainly that the alleged debt was disputed on substantial grounds and that the debtor company had a cross-claim against the affiliate corporation for damages for breach of contract. There was also evidence that the petitioner and its affiliate corporation were resorting to the winding-up proceedings to bring improper pressure on the debtor company. In addition, there were other grounds which I held warranted the refusal of the order for substitution.

There was really no dispute here that the Government of Singapore was even on the date of 27 June 1986, a creditor of the company. Plainly, Counsel for the company could not in truth deny that. What was in dispute was the actual amount due or owing from the company to the Government. Counsel for the applicant in his submission said that the company owed the Government at least a sum of $20,568,460.77 as of that date. That amount was not admitted by the company. However, whatever might be the position, the fact is that some amount was owing by the company to the government in respect of the instalments for the purchase of the land by the company. Accordingly, the Government was and is a creditor of the company and would have a right to present the petition.

In the alternative, it was further submitted by Counsel for the applicant that even if there was no debt then due and payable by the company to the government, the applicant on behalf of the government would still have a right to present the petition. Section 253(1)(b) of the Companies Act (Cap. 50, 1990 Edn.), entitles a contingent or prospective creditor of a company to present a winding up petition and that the government was certainly a contingent or prospective creditor of the company as at 27 June 1986. The expression "contingent or prospective creditor" has not been defined in the Act. In the case of *In re William Hockley Ltd.* [1962] 1 WLR 555 at p. 558 Pennycuick J expressed his view as follows:

> The expression "contingent creditor" is not defined in the Companies Act, but must, I think, denote a person towards whom under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date.

That definition was quoted (without any disapproval) by the High Court of Australia in the case of *Community Dvpt. Pty. Ltd. v. Engwirda Construction Co.* [1969] 120 CLR 455. In that case, a building contractor presented a petition for the winding up of the building owner and the petition was founded on the obligations of the latter under the building contract to pay the balance of the contract price upon a certificate of the architect. There was a dispute between the petitioner and the building owner as to whether the petitioner was entitled to the final certificate, and the architect had declined to issue the certificate with the result that the petitioner would not be entitled to any further payment unless and until it received an award from the arbitrator under the provisions of the contract for the appointment of an arbitrator. However, no arbitrator had yet been appointed. Nonetheless, it was held that the

petitioner was a contingent creditor and was entitled to present the petition. Kitto J in his judgment, after having referred to the definition of contingent creditor given by Pennycuick J, said at pp. 459-460:

> The importance of these words for present purposes lies in their insistence that there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen. A building contract creates, as soon as it is entered into, an obligation upon the building owner to pay the contract price, either as a whole upon a future event or, more usually, by progress and final payments each of which is to be made on a future event. The event or events may not happen, but if and when one of them does happen the building owner, by force of the contractual obligation, must pay the builder a sum of money. It is, I think, nothing to the point that the event may be complex, as where the payment is agreed to be made when the whole or some part of the work has been done to the satisfaction of an architect as expressed in a certificate or to the satisfaction of an arbitrator as expressed in an award: *the building owner is bound from the time the contract is made to pay money to the builder upon a contingency; and that in my opinion makes the builder a contingent creditor of the owner.*
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> *So here, even if the work required by the contract has not yet been properly completed, the fact remains that the appellant is presently bound by the obligation of the contract to make the final payment if and when, according to a certificate of the architect or an award of an arbitrator, the time for the payment has arrived. The respondent is therefore, in my opinion, a contingent creditor of the appellant for the amount of that payment, whatever the amount may turn out to be.*
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> (Emphasis added)

Similarly in this case, there was, and there still remains, an obligation on the part of the company to pay to the government the instalments for the purchase of the land. It was not contended by the company, nor was it their case, that all the instalments have been paid and nothing was and is owing to the Government. The government was, in my opinion, a contingent or prospective creditor, and the applicant on behalf of the Government would be entitled to present the petition at the date it was filed.

As I held in *In re Marinaview*, there is finally the question whether I should exercise my discretion in granting or refusing an order for substitution. In this case, the hearing of the petition has been delayed far too long. It began on 27 June 1986 and up to this date it has not been resolved or disposed of. It appears from the petition that the company is insolvent. In particular, as I have upheld the liquidators rejection of the proof of debt submitted by the company in the winding up of Katong, there is a huge amount of $11,765,441.24 immediately due and payable by the company to Katong. The company is hopelessly insolvent. In the circumstances, I therefore exercised my discretion under r. 33(1) and made the order for substitution asked for.

Also found at [1992] 1 CLJ 314